88-963 (1)

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In the

Supreme Court of the United States

October Term, 1988

Eva J. Culberson
Petitioner

V.

Veterans Administration
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS ERRED BY NOT APPLYING THE ANALYSIS SET FORTH IN *MCDONNELL DOUGLAS AND BURDINE* IN REVIEWING THE DISTRICT COURT'S DETERMINATION THAT THE PLAINTIFF, A BLACK FEMALE ATTORNEY WITH THE VETERANS ADMINISTRATION DETROIT OFFICE OF DISTRICT COUNSEL, FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ON THE BASIS OF RACE AND SEX BY SHOWING THROUGH ADMISSIONS OF DEFENDANT'S AGENTS AND UNCONTROVERTED EVIDENCE THAT, ALTHOUGH SHE MET THEIR QUALIFICATION STANDARDS FOR A GS-12, SHE WAS HIRED AS A GS-9 ATTORNEY, WHILE A WHITE MALE WHO MET THEIR QUALIFICATION STANDARDS FOR A GS-9 WAS HIRED AS A GS-12 ATTORNEY, AND A WHITE FEMALE WHO MET THEIR QUALIFICATION FOR A

GS-9 ATTORNEY WAS HIRED AS A GS-11 ATTORNEY.

II.

WHETHER THE COURT ERRED BY NOT APPLYING CONGRESSIONALLY MANDATED FEDERAL PERSONNEL POLICY IN REVIEWING THE LOWER COURT'S DECISION THAT DEFENDANT ESTABLISHED LEGITIMATE BUSINESS REASONS AS A DEFENSE.

III.

WHETHER THE COURT'S FAILURE TO APPLY THE THIRD PHASE OF THE TRIPARTITE TEST SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* REGARDING THE ISSUE OF PRETEXT IN REVIEWING THE PLAINTIFF'S CLAIM OF VIOLATION OF TITLE VII IS ERRONEOUS AS A MATTER OF LAW.

IV.

WHETHER THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S EQUAL PAY ACT CLAIM IS IN ESSENCE THE SAME AS HER CLAIM FOR VIOLATION OF TITLE VII WHEN BOTH CLAIMS ARE BASED ON DIFFERENT FACT.

V.

WHETHER THE COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THERE WAS NO EVIDENCE OF A VIOLATION OF THE EQUAL PAY ACT, WHEN THE RECORD CLEARLY REVEALS THAT DEFENDANT ADMITTED AND PLAINTIFF PRODUCED DOCUMENTARY EVIDENCE COMPILED BY DEFENDANT WHICH SHOWS THAT SHE WAS PAID LESS THAN GS-13 WHITE MALE ATTORNEYS FOR PERFORMING WORK AT THE GS-13 LEVEL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Eva Culberson, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on June 27, 1988 and the United States District Court for the Eastern District of Michigan entered on July 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals appears at page 1a of the appendix hereto. The findings and conclusions of the District Court appear at page 8a of the appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1988. The order for denial of petition for rehearing was entered on August 15, 1988. The

jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This suit involves application of the following statutes, regulations, and Court rules (which are reproduced at page 19a, et seq. of the appendix hereto):

29 U.S.C. 206 (d) (1), 203 (d), 203 (x) and 203(e) (2)

42 U.S.C. 2000e-et. seq.

5 U.S.C. 2301-2302

5 U.S.C. 5101, 5102, 5104, 5107

5 U.S.C. 5361-5363

5 U.S.C. 5332-5334

5 C.F.R. 713

5 C.F.R. 536.208, 212, and 213

STATEMENT OF THE CASE

Synopsis

The plaintiff, a black female attorney, brought this action against defendant, an agency of the federal government, for violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et. seq., and for violation of the Equal Pay Act, 29 U.S.C. Sec. 206(d)(1), as amended.

The basis of the Title VII claim is that defendant discriminated against plaintiff on the basis of race and sex in 1979 by circumventing federal employment policy by hiring her at the GS-9 attorney level, despite the fact that she met its qualification standards for the GS-12 attorney level and was promised a GS-11 attorney level position, while it hired a white male at the GS-12 attorney level even though he only met its qualification standards for the GS-9 attorney level and by hiring

a white female at the GS-11 attorney level even though she only met its qualifications for the GS-9 attorney level.

The basis of the Equal Pay Act claim was the fact that plaintiff was paid less than white male GS-13 attorneys for performing the same work at that level.

In defense of the claims, defendant stated in its Answer and Final Pretrial Statement that: "(1) Mr. Fernholz, the hiring official, did not promise the plaintiff that she would be promoted immediately upon passing the bar; (2) the usual "time in grade" as a GS-9 is one year before being promoted to a GS-11; (3) the white male who started the same day as plaintiff as a GS-12 was not similarly situated in as much as he was already an attorney and had been with the VA for several years; (4) assuming that Mr, Fernholz made the promise, it is not binding on the

VA because it is contrary to Agency policy." No other defenses were alleged.

Immediately prior to trial plaintiff made a motion to suppress any affirmative defenses which defendant might raise or seek to raise during the trial. The trail judge took the motion under advisement, but never issued a decision on it. Plaintiff also requested that affidavits from the administrative record be admitted. This request was denied. The judge held that plaintiff failed to establish a prima facie case for violation of Title VII, but even if she did defendant established a legitimate business reason. No analysis was made regarding the issue of pretext. The trial judge also held that there was no evidence of a violation of the Equal Pay Act. Both claims were dismissed. The Court of Appeals affirmed, stating that the essence of the Equal Pay Act claim and the Title VII claim were the same. Plaintiff's Petition for Rehearing on

the basis that the decision was in conflict with Supreme Court decisions and that the Court of Appeals had misapprehended the facts basic to the Equal Pay Act claim was denied.

FACTS

TITLE VII

Undisputed evidence presented to the district court showed that in September, 1979, plaintiff, a black female recent law school graduate with 2-1/2 years of experience as a student attorney and awaiting the July bar examination results applied to the Veterans Administration Office of District Counsel in Detroit, Michigan for a general attorney position in response to its recruitment letter to a local law school seeking recent law school graduates for a general attorney trainee position. She was interviewed by Theodore Fernholz, Acting District Counsel, and informed that the entry level for a general attorney trainee position was GS-11. During

the interview he took her to the personnel office for further explanation of pay, increases, benefits and leave for the position. Evelyn Jones, Personnel Specialist, explained these matters as applicable for the GS-11 position as instructed by Mr. Fernholz. At trial Mr. Fernholz denied that he had informed plaintiff that the entry level was GS-11. Plaintiff sought to introduce the affidavit of Ms. Jones, taken by defendant's EEO investigator in 1980 and made part of the administrative record.[1] Ms. Jones stated in the affidavit that she had overheard Mr. Fernholz tell plaintiff that the entry level for general attorney trainee in Detroit was GS-11, was present when he informed plaintiff of such, and overheard him promise plaintiff that once she passed the bar she would receive the GS-11 attorney position. At

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[1] The EEO Hearing Officer ruled in plaintiff's favor on the Equal Pay Act claim, but elected not to rule on the Title VII claim. Defendant rejected the decision.

the time of trial Ms. Jones had been transferred to the VA personnel office in Montgomery, Alabama. The trail judge denied the request for admission of the affidavit on the basis that Ms. Jones was not unavailable. (T. Tr. 6/29/87, pg. 8).

Evidence further showed that subsequent to the initial interview, Mr. Fernholz called plaintiff over the weekend and during his off-duty hours to offer to create an interim or temporary position "so that she could start early before the bar results arrived" (Testimony of Mr. Fernholz, T. Tr. 6/29/87, page 162, lines 8-16; page 163, line 6). A few days later he informed her that a GS-9 clerkship had been created. After being assured by Mr. Fernholz that she would still receive the GS-11 attorney position upon receipt of favorable bar results, Plaintiff accepted the clerkship and began work on October 21, 1979. Mr. Fernholz denied that he promised plaintiff the GS-11. She notified Mr. Fernholz of

favorable bar results two weeks later. He informed her that action would be commenced to convert her to the GS-11 attorney position. Instead, On November 7, 1979 he requested that she be converted to a GS-9 attorney position and sought to recruit a GS-9 or GS-11 attorney trainee. Several weeks later Mr. Fernholz informed plaintiff that she was not going to receive the GS-11 attorney position and stated that a GS-9 was all she was going to get and if she did not like it she could just leave. He also informed her that if she was "married and had kids" he "could see it". Mr. Fernholz denied making these statements. Plaintiff met the VA Qualification Standards for a GS-12 attorney (Plaintiff's Trial Exhibit #2). These Qualification Standards were in effect at the time plaintiff was hired.

In October, 1979, Richard Cunningham, a white male, also applied for a general attorney position with this office. He had passed the bar six

months earlier but had no legal experience. At the time, he was employed as chief of field service, a non-legal competitive service position in the Department of Veteran's Benefits, a position to which he had recently been appointed. The office of District Counsel hired him as a GS-12 attorney (Testimony of John MacMillan District Counsel, T. Tr. dated 6-29-87 - page 35, lines 12, 16 and 24), even though the regulations require that one with no legal experience as set forth in the VA Qualifications Standards be hired at the GS-9 attorney level. (Testimony of J. MacMillan T. Tr. dated 06-29-1987- page 30, lines 17-22; page 42, lines 11-16). Mrs. Cunningham's, work assignment was not as diverse as plaintiff's. She trained him (T. Tr. 6/30/87, pg. 42, line 23, pg. 43, lines 1-19).

In 1977 or 1978 a white female with teaching experience of an unknown nature, but no legal experience was hired as a GS-11 attorney.

As of November, 1979 the organizational chart of the professional staff in the Detroit Office of District Counsel was as follows:

Position	Race	Sex	Grade	Entry Level & Experience
District Counsel - MacMillan	White	Male	GS-15	----------
Ass't District Counsel - Fernholz	White	Male	GS-14	----------
General Attorney - Winslow	White	Male	GS-13	Less than one year
General Attorney - Wright	White	Male	GS-13	Two months General
General Attorney - White	White	Male	GS-13	None
General Attorney - Couch	White	Male	GS-13	GS-11 - None
General Attorney - Faes	White	FM	GS-13	GS-11 - None
General Attorney - Vollmar	White	Male	GS-13	GS-11 - None
General Attorney - Cunningham	White	Male	GS-12	GS-12 - None
General Attorney - Culberson	Black	FM	GS-09	GS-09 - 2-1/2 Years

Mr. Coy, Deputy General Counsel in Washington, D.C., testified that the qualifications and classification standards for attorney positions are issued by the Office of Personnel Management (T. Tr. 6/30/87, pg. 18, line 23; pg. 19, line 1). The federal statutes governing the terms and conditions, policies and authorized procedures for employment with federal agencies is set forth in Title 5 United States Code Section 5101 et. seq. (Appendix 21a hereto) Defendant alleged that it had established a "GS-9 only" hiring policy, but there were exceptions based on the qualifications and experience of the attorney (Mr. Coy: T. Tr. 6/30/87 pg. 95, lines 22-25, Mr. MacMillan: T. Tr. 6/29/87 pg. 93). No documentary evidence of such a policy was presented and none could be found in Title 5. Nevertheless plaintiff showed, and it was undisputed, that she met this exception. Plaintiff produced documentary evidence that she met the VA qualifications for a GS-12 attorney, *(plaintiff's Exhibit 8)*, that Mr.

Cunningham did not meet the exception and that federal agencies were directed to hire racial minorities in grades 11 and above and women in grades 9 and above in order to alleviate the underrepresentation of these groups in the federal employment sector (5 C.F.R. 720.901, Subpart J).

At trial plaintiff filed a motion to suppress any affirmative defenses which defendant might raise or seek to raise during the trial. The trial judge took the motion under advisement but never issued a decision on it. (T. Tr. 6/29/87, pg. 4-5) At trial plaintiff attempted to produce affidavits from the administrative record as material evidence. (T. Tr. 6/29/87, pg. 8):

(1) affidavits from the administrative record which showed that plaintiff was informed at the initial interview that the entry level for attorneys in the Detroit District

Counsel Office was GS-11 and that plaintiff was promised a GS-11 attorney if she passed the bar.

(2) affidavit from the administrative record which showed that a black male had applied for a general attorney position shortly after defendant sought recruitment for a GS-9 or GS-11 attorney trainee in November, 1979 but he was never called for an interview and upon inquiry was informed that there were no openings, despite the fact that interviews were taking place for the positions which subsequently went to Mr. Golski and Mr. Lafave, white males hired in early 1980.[2] Plaintiff also attempted to produce

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2 After the Jones affidavit was ruled inadmissible plaintiff's counsel, declined to pursue arguments to admit other affidavits, taken during the administrative process.

evidence of reneged promises made to other black females regarding employment opportunities. The court denied the request (T. Tr. 6/30/87, pg. 55) Further, the court did not consider evidence which showed that plaintiff made a suggestion pursuant to defendant's solicitation for productivity methods; the suggestion was approved but half of the award was given to a white male.

EQUAL PAY ACT

Evidence further showed that after plaintiff filed a complaint pursuant to defendant's EEO procedures, the Detroit District Counsel hired two (2) white males at the GS-9 attorney level. One of those males performed debt collection work. (T. Tr. 6/29/82, pg. 41 Line 19, Pg. 71) The other performed work of a different nature from plaintiff. (T. Tr. 6/29/87, pg. 70) Approximately seven (7)

months later Mr. Fernholz wrote a letter to the General Counsel in Washington, D.C. stating that plaintiff had been employed as a GS-9 attorney for 10 months and had performed diverse assignments "consistently exceeding the requirements of the GS-11 level." Both Mr. Fernholz and Mr. MacMillan admitted that plaintiff was being paid as a GS-9 attorney during this time (T. Tr. 6/29/87 Pg. 74; T. Tr. 6/30/87 pg. 187) It was undisputed that plaintiff was actually performing work at the GS-13 level, the same as white male GS-13 attorneys, Couch, Vollmar, Wright, and Winslow, and that she continued to perform at this higher level through the time of the trial.

REASONS FOR GRANTING WRIT

Introduction to Arguments

Preliminary to the Arguments, plaintiff notes that a decision by a district court on the issue

of discrimination under Title VII is subject to review under the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982); Findings are clearly erroneous if upon review of the entire record the court is left with a definite and firm conviction that a mistake has been committed. *United States v. Gypsum*, (333 U.S. 364 (1948). The clearly erroneous standard does not insulate either the trial court's conclusions of law, *Pullman-Standard*, supra, or factual findings that result from application of incorrect legal principles. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, 2182, 2188, 72 L. Ed. 2d 606 (1982). Rule 52(a) does not proscribe the standard of review for questions of law or questions of fact predicated on an erroneous view of the law. *Bose v. Consumers Union*, 104 S. Ct. 1949 (1984).

Where documents or objective evidence contradict a witness' story, or the story itself is so internally flawed that a reasonable fact finder would not credit it, the Court of Appeals may well find clear error. *Anderson v. City of Bessemer City, N.C.*, 105 S. Ct. 1504, 1513 (1985).

The Court of Appeals should examine all of the evidence in the record relating to salary disparities under the clearly erroneous rule. *Brazemore vs. Friday*, 106 S. Ct. 3000 (1986)

Title VII prohibits discrimination on the basis of race and sex in hiring, promotion, classification and, terms and conditions of employment....except when such action is based on a bona fide seniority system, merit system, system based on

quantity or quality of production 42 U.S.C. 2000e, et seq.

The Equal Pay Act prohibits discrimination on the basis of sex by paying a member of one sex less than the other for jobs the performance of which requires equal skill, effort and responsibility, except when the pay differential is based on the same affirmative defenses set forth in Title VII, plus a factor other than sex.

This Court has noted that employment procedures which operate as built in head-winds for minority groups and which are unrelated to job capability cannot withstand a prima facie case of discrimination, *Griggs v. Duke Power Co*, 401 U.S. 424 (1971). Discrimination in terms, conditions, or privileges of employment violates Title VII, *Hishon v King, Spaulding et al.*, 467 U.S. 69 (1984) (promise made to female attorney not kept, while promise

made to male attorneys could constitute a violation of Title VII). Where one has an affirmative duty to eradicate discrimination, failure to do so gives rise to an inference of discriminatory animus. *Columbus Board of Education v Pernick*, 443 U.S. 449, 99 S. Ct. 1941, 61 L.E.d., 2d 666, (1979).

This Court stated that Title VII prohibits discriminatory, arbitrary, and unnecessary barriers to employment in any way that would deprive or tend to deprive an individual of employment opportunity. This Court further stated that where an employer uses a non-job related barrier in order to deny a woman or a minority applicant employment or promotion and that barrier has a significant adverse effect on the woman or minority, then the individual has been denied employment opportunity because of race or sex... *Connecticut v Teal*, 102 S. Ct. 2525, 457 U.S. 440 73 L.Ed. 2(d) 130 (1982). "An Appellate

Court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary." *Thorpe v Housing Authority of City of Durham*, 393 U.S. 268, 281, 89 S Ct., 518 (1969); and *Bradley v School Board of City of Richmond*, 416 U.S. 696, 711 (1974). The Court of Appeal's decision is contrary to or in conflict with the above-referenced principles for the reason set forth in the arguements below.

TITLE VII

I.

THE COURT OF APPEALS ERRED BY NOT APPLYING THE ANALYSIS SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* IN REVIEWING THE DISTRICT COURT'S DETERMINATION THAT THE PLAINTIFF, A BLACK FEMALE ATTORNEY WITH THE VETERANS ADMINISTRATION DETROIT OFFICE OF DISTRICT COUNSEL, FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ON THE BASIS OF RACE AND SEX.

In *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S Ct. 1080 (1981), this Court set out a tripartite scheme of proof of an allegation of a violation of Title VII by a preponderance of the evidence:

(1) Plaintiff's prima facie case.
(2) Defendant's articulated "legitimate non-discriminatory reason."
(3) Plaintiff's evidence of pretext which may consist of direct evidence, such as statements of admissions, comparative evidence, or statistics.

Neither the District Court or the Court of Appeals correctly applied this test as required by this Court. In *McDonnell Douglas*, this Court stated that in order to establish a prima facie case of discrimination on the basis of race and sex, a plaintiff in a Title VII action has the initial burden of establishing facts by a preponderance of the

evidence which shows that he or she: 1) is a member of a protected group; 2) applied for a particular job for which the employer was seeking applicants; 3) was qualified for the job; but 4) was rejected, and the employer continued to seek other applicants with plaintiff's qualifications. The degree of proof is merely by creating an inference of denial, of an employment opportunity, not to a scientific certainty. *Brazemore v. Friday*, 106 S. Ct. 3000 (1986). *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984). However, the specification of the prima facie proof in *McDonnell Douglas* is not necessarily applicable in every aspect to differing factual situations, *McDonnell Douglas*, supra, 411 U.S. at 803 (N13; *International Brotherhood of Teamsters v United States*, 431 U.S. 358 (1977); *Burdine*.

Plaintiff established her prima facie case by producing undisputed and uncontroverted evidence

that she: (1) was a member of a protected group (black and female); (2) applied for a general attorney position in response to defendant's recruitment letter seeking recent law school graduates for a general attorney trainee position; (3) was a qualified applicant in that she met the specifications advertised (had the recruitment letter specified recent bar admitted, plaintiff would not have been so qualified to apply). Mr. Fernholz testified that it was understood that she would have to pass the bar before being hired as an attorney; (4) was hired as a GS-9 attorney even though she met the VA Qualification Standards for a GS-12 attorney position in that she had 2-1/2 years of legal experience; (5) a white male with no legal experience was hired as a GS-12 attorney even though he only met defendant's qualification standards for a GS-9 attorney position; (6) a white female with no legal experience was hired as a GS-11 attorney.

Evidence showed that plaintiff accepted the interim or temporary GS-9 law clerk position pending receipt of the bar results. Plaintiff testified that it was accepted after being assured by Mr. Fernholz that she would receive the GS-11 attorney position upon receipt of favorable bar results. Plaintiff showed that she met the prerequisite to the attorney position within 2 weeks of commencing the temporary position. Instead of recommending her for the GS-11 attorney position as promised, Mr. Fernholz recommended her for a GS-9 attorney position and sought to recruit a GS-9 or GS-11 attorney trainee. Plaintiff showed that Mr. Fernholz and Mr. MacMillan had recommended that the white male be hired as a GS-12 attorney and that the white female be hired as a GS-11 attorney even though they were only qualified for a GS-9 attorney position.

The trial judge's decision did not consider the undisputed facts and admissions of defendant in determining whether plaintiff had established a prima facie case. In *Continental Ore Co., v Union Carbide Co.*, 370 U.S. 690 699, 82 S. Ct. 1404, 1410 (1962), this Court stated that "Appellants should be given the full benefit of their proofs." The decisions of the Court of Appeals and the District Court are in conflict with this decision because uncontroverted evidence and admissions of defendant favorable to plaintiff were not considered by the courts. "While Rule 52(a) does not require a trial judge to account for all of the evidence presented, it does require the judge to account for or refer to uncontradicted evidence." *Griffin v City of Omaha*, 785 F2d 620 (CA 8, 1986) (Black female recruits who were terminated from city policy department training program sued alleging race and sex discrimination;

trial judge dismissed; Court of Appeals reversed and remanded finding trial court's findings clearly erroneous for failure to account for evidence favorable to plaintiff, disregard of uncontradictory evidence, and passing over other important evidence). The decision is also contrary to long established precedent of the Court of Appeal, See, *Clemmons v Board of Education of Hillsboro*, 228 F 2d 853 (C.A. Ohio 1956) Cert denied 76 S. Ct. A 651, 350 U.S. 1006 (held failure or refusal to properly apply the law to conceded or undisputed facts is an abuse of discretion; misapplication of the law to the facts is itself abuse of discretion requiring re-reversal).

The trial judge failed to apply the law set forth by this Court in determining whether plaintiff established a prima facie case. Such action, sanctioned by the court of Appeals, requires the supervision of this Court.

II.

THE COURT ERRED AS A MATTER OF LAW BY NOT CORRECTLY INTERPRETING AND APPLYING THE FEDERAL STATUTE GOVERNING EMPLOYMENT POLICY BEFORE CONCLUDING THAT DEFENDANT ESTABLISHED "LEGITIMATE BUSINESS" REASONS TO PLAINTIFF'S CLAIMS.

In the Answer and Final Pretrial Statement defendant alleged that: 1) Mr. Fernholz, the hiring official, did not promise plaintiff that she would be promoted immediately upon passing the bar; 2) the usual "time in grade" as a GS-9 is one year before being promoted to a GS-11; 3) the white who started the same day as plaintiff as a GS-12 was not similarly situated in as much as he was already an attorney and had been with the VA for several years; 4) assuming that Mr. Fernholz made the promise, it is not binding on the VA because it is contrary to Agency policy. On the day of trial plaintiff argued a motion to suppress any defenses which defendant might seek to raise during the trial.

The gist of plaintiff's motion was that Rule 8(c) of the Federal Rules of Civil Procedure provide that a party must set forth all affirmative defenses and any other matter constituting an avoidance in its answer or final pretrial statement, otherwise such matters are waived. In support of the motion plaintiff cited *Jackson v. Seaboard Coast Line R. R. Co.*, 678 F2d 992 (11th Cir. 1982), for the proposition that statutory defenses or exceptions in a Civil Rights action are affirmative defenses which must be pled in the first responsive pleading or final pretrial statement, and *Morgan Guaranty Trust Co. of New York City v Blum*, 649 F.2d 342 (C.A.5 , 1981); and *Pinto Trucking Service, Inc. v Motor Dispatch, Inc.*, 649 F2d 530 (C.A. 7, 1981). See also *Musico v Champion Credit Corp.*, 764 F 2d 102 (C.A. 2, 1985). The trial judge took the motion under advisement. During the trial the judge refused to allow plaintiff to introduce evidence not listed in the final pretrial

statement unless the motion was waived. Plaintiff abandoned efforts to introduce other such evidence. Although the trial judge had taken the motion under advisement he never issued a decision. In fact he rendered a decision on the case in chief without deciding the motion. The decision placed a great deal of emphasis on the fact that plaintiff had stated on her job application that $16,000.00 was the minimum starting salary that she would accept. The Court of Appeals also based its decision primarily on this argument. Ms. Jone's affidavit was crucial to determining whether plaintiff was willing to accept a GS-9 attorney position. She was present when Mr. Fernholz assumed plaintiff that if she accepted the GS-9 clerkship and passed the bar, she would receive the GS-11 attorney position. Exclusion of the affidavit was erroneous as a matter of law. It is customary for a court to dispose of all preliminary matters prior to rendering a decision. Although the

judge stated that he would rule on the motion at the end of the matter, he failed to do so.

The Court of Appeals departed from and sanctioned the trial court's departure from the accepted course of judicial proceedings. The decision conflicts with decisions rendered in the Eleventh, Seventh, Fifth and Second Circuits on the issue of waiver and the Federal Rules of Civil Procedure, Rule 12 (b) which provides that every defense in law or fact to a claim for relief in any pleading shall be asserted in the responsive pleading, if one is required, except that the certain defenses may at the option of the pleader be made by motion. Defendant did not make a motion to allege the $16,000.00 as a defense. During the 8-1/2 years that the case was pending, defendant never alleged that it had relied on the numerical figure set forth on the application.

Therefore, its allegation at trial that that was a basis is not worthy of credence.

The Court deviated from the usual course of judicial proceedings in applying or construing the "national policy." It is well established that where resolution of a question of federal law, terms, statutes or enactments of Congress are at issue, the court should first look to the statutory language to ascertain Congressional intent. *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Consumer Product Safety v GTE Sylvania*, 447 U.S. 102 (1980); *Blum v Stenson*, 465 U.S. 886 (1986). The purpose of Title 5 U.S. Code is to provide a scheme whereby employment in the federal government will be made on the basis of qualification.

The national policy which the Court stated allowed Mr. Cunningham to be transferred is found

at Title 5 U.S.C. 5361-5366, which provides for pay retention of an employee who is placed in a lower grade as a result of reduction in force procedures or whose position is reduced in grade as the result of reorganization or reclassification of the position, there was no evidence or allegation that Mr. Cunningham's non-attorney position was reduced in grade. He was hired into an entirely different department, with different duties and responsibilities. There was no reduction in force. He made a voluntary move to a new job compatible with his newly acquired license to practice law. The entry level for this new job was GS-9. He did not possess qualifications above this level. He did not meet the criteria for the exception to the "GS-9 only" policy nor grade or pay retention. The court erred by not closely scrutinizing the reasons proffered by defendant and by not interpreting the statutes governing federal personnel policy as intended by Congress.

Title 5 C.F.R. 536.101-209 contains the regulations which the Office of Personnel Management has prescribed for the administration of grade and pay retention. Section 103 (1) provides that grade retention shall apply to an employee who moves to a position which is lower graded than the position held immediately prior to the demotion as the result of reduction in force or reclassification of the position. Subsection (b) provides that the head of the agency may offer grade retention to eligible employees who might be reduced in grade as the result of reclassification or reorganization announced by management in writing. Subsection 105 specifically excludes coverage for grade and pay retention for an employee who is reduced in grade or pay for personal cause or at the employee's request.

Eligibility for grade retention also ceases if the employee elects in writing to terminate the

benefits of grade retention. Subsection 536.207 (a) (4) and (b) (1). "Demotion at an employee's request" means a reduction in grade which is initiated by the employee for his or her benefit, convenience or personal advantage. Subsection 102. Clearly, Mr. Cunningham did not meet the grade retention requirements. He voluntarily applied for the attorney position. On October 18, 1979, he relinquished in writing any benefits he would have had by virtue of competitive service (J. M. MacMillan, T. R. 6-29-87, page 107). The Legislature has proscribed the circumstances under which a federal employee may be accorded a preference in employment. Clearly, no preference is authorized when the move is for personal cause.

Title 5 U.S.C. 2302 (b) (6) prohibits federal employers from granting preferences or advantages not authorized by law rule or regulation to any

employee or applicant for employment (including defining the scope or manner of competition or requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

Since the "legitimate business reason" referred to by the Court of Appeals are contrary to the statutory objective criteria for government employment, it was error as a matter of law for the Court to sanction such act as a defense to plaintiff's claims.

The defense sanctioned by the Court of Appeals in the instant case is contrary to the congressional purpose as clearly set forth in the national policy and has an adverse impact on all members of the protected groups which have been found by Congress to be underrepresented in the

federal workplace. Employment procedures which operate as built in head-winds for minorities and are unrelated to job capability cannot withstand a prima facie case of discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971). The national policy was circumvented to accord an unauthorized preference to the white male, and to deny plaintiff employment opportunity based on merit principles. In *Barber v International Brotherhood of Boiler Makers*, 778 F 2d 750, on remand 651 F Supp. 265 (CA 11, Ala. 1985) where officials circumvented certain prohibitative rules to aid advancement of white employees but did not bend the rules for black employees, they engaged in racial discrimination.

This Court has stated that Title VII prohibits discriminatory, arbitrary and unnecessary barriers to employment in any way that would deprive or tend to deprive an individual of employ-

ment opportunity. This Court further stated that where an employer uses a non-job related barrier in order to deny a woman or a minority applicant employment or promotion and that barrier has a significant adverse effect on the woman or minority, the individual has been denied employment opportunity because of race or sex *Connecticut v Teal*, 102 S. Ct. 2525, 457 U.S. 440 73 L. Ed. 2 d 130 (1982). The decision is in conflict with this Court's decisions on the test to be applied in reviewing a defense to a Title VII claim for the reasons set forth herein and in Arguement III.

In *Village of Arlington Heights v Metropolitan Housing Development*, 429 U.S. 252, 267 (1977), this Court noted that a United States agency's deviation from internal regulations and procedures cannot serve as the basis of a legitimate explanation sufficient to overcome a prima facie case of dis-

crimination. The defense must be a legitimate non-discriminatory reason not just any reason. *Jennings v Tinsley Park Community School*, 796 F2d 962, (C.A. 7, 1986). Defendant deviated from the national policy and the objective criteria set forth in its qualification standards to the extent of according a preference to Mr. Cunningham and Ms. Faes, while at the same time refusing to follow the national policy and objective criteria or the preference with respect to plaintiff. The Court of Appeals erred in not correctly interpreting or applying the national policy.

III.

THE COURT'S FAILURE TO APPLY THE THIRD PHASE OF THE TRIPARTITE TEST SET FORTH IN *MCDONNELL DOUGLAS* AND *BURDINE* REGARDING THE ISSUE OF PRETEXT IN REVIEWING THE PLAINTIFF'S CLAIM OF VIOLATION OF TITLE VII IS ERRONEOUS AS A MATTER OF LAW.

Contrary to the standard of review customarily required by this Court, the lower Court failed to make findings of fact and conclusions of law on the issue of pretext. See *Mcdonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973); *Burdine v Texas Department of Community Affairs*, 450 U.S. 248 (1981); *Cooper v Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); and *Brazemore v Friday*, 106 S Ct. 3000 (1986). Having found that there was a "GS-9 only" hiring policy, the lower court should have gone further to determine whether the policy was applied equally when plaintiff and Mr. Cunningham were hired. Mr. MacMillan testified that there were exceptions to the policy depending on the applicant's qualifications and experience (T. Tr. 6/30/87, page

95, lines 22-25). This exception was apparently not applied in plaintiff's case even though she possessed qualifications substantially above the GS-9 level, and was an extremely desirable potential employee as evidenced by the fact that Mr. Fernholz went to the extent of calling her during his off-duty hours and over the week-end to offer her an interim position "so that she could start early before the bar result arrived.", (T. Tr. 6/29/87 - page 162, lines 8-16; page 163, line 6). Neither the white male nor the white female possessed qualifications above the bare minimum for a GS-9 attorney. Mr. MacMillan testified that nevertheless, he recommended that they be hired at their respective levels and that the Washington Office approved the recommendation (T. Tr. 6/20/87 - page 29, line 19; page 52, line 15). He only recommended plaintiff for a GS-9 despite her qualifications for a GS-12. Relevant evidence concerning pretext would include unequal application

of the nondiscriminatory reasons offered by the employer for its employment decision. *McDonnell v Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *McDonnell-Douglas Corp v Green*, supra, 411 U.S. 792; *Worthy v U.S. Steel Corp.*, 616 F2d 698 (1980); *Corley v Jackson Police Department*, 566 F2d 994 (5th Cir. 1978); *Ste. Marie v Eastern R. R. Assn.*, 650 F2d 395 (2nd Cir. 1981). It also includes evidence of failure of the employer to live up to its affirmative action program, *Taylor v Teletype Corp.*, 648 F2d 1129, 1135 (8th Cir. 1981) cert. denied 454, U.S. 969 (1981); *Page v Bolger*, 645 F2d at 231 (1981); and evidence of the employer's general policy and practice with respect to employment of members of the protected class, including statistical manifestations of that policy and practice, *International Brotherhood Teamsters v United States*, 431 U.S. 324 (1977); *McDonnell-Douglas Corp. v Green*, supra. Plaintiff produced evidence which showed that prior

to plaintiff, defendant had not hired any black attorneys in the Detroit office of District counsel since the office was established. Nor had it hired any during the 8 years since plaintiff was hired despite the fact that there had been vacancies and 3 white males were hired. The trial judge refused to allow evidence of treatment of other women. The trial judge discounted the relevance of the broken promise to plaintiff.

The Court of Appeals sanctioned the trial court's departure. No documentary evidence of a "GS-9 only' hiring policy was produced. Plaintiff produced documentary evidence of, and requested the trial judge to take judicial notice of Title 5 Code of Federal Regulations, part 720, Appendix J which directed all federal agencies to hire racial minorities in positions at and above GS-11, and women above

GS-9 in order to alleviate the underrepresentation of these groups in federal employment.

The reasons proffered by Defendant did not legally justify hiring Plaintiff at the lower GS-9 attorney level. Briefly: "time in grade" applied to promotions not hiring; the "9 only" hiring policy was not applied to the white male; even though Mr. Fernholz and Mr MacMillan thought they had authority to hire at GS-9 and GS-11, Plaintiff was never recommenced for the GS-11 position, notwithstanding her qualifications and job performance above that level; the white male did not meet the statutory requirements for a transfer or reassignment. Defendant's proffered "defenses" were unworthy of credence and contrary to the law governing federal employment. Neither the Court of Appeals or the District trial judge considered the

issue of pretext. Such action was clearly erroneous as a matter of law.

EQUAL PAY ACT

IV.

WHETHER THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S EQUAL PAY ACT CLAIM IS IN ESSENCE THE SAME AS HER CLAIM FOR VIOLATION OF TITLE VII WHEN BOTH CLAIMS ARE BASED ON DIFFERENT FACT AND THE RECORD CLEARLY REVEALS THAT PLAINTIFF WAS PAID LESS THAN GS-13 WHITE MALE ATTORNEYS FOR THE JOB ACTUALLY PERFORMED.

The Equal Pay Act (the Act) provides than an employer shall not discriminate "between employees on the basis of sex by paying wages to employees... at a rate less than the rate (paid)...to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 29 U.S.C. 206(d)(1). The term "employer" includes the federal government, Id. 203(d), (x); see also 203(e)(2).

The plaintiff in an Equal Pay Act case has the initial burden of proving a violation by demonstrating that: 1) an employer pays or paid different wages to employees of the opposite sex in an establishment, when they are doing equal work on jobs, the performance of which requires equal skill, effort, and responsibility.

Plaintiff showed precisely that while performing work with the same degree of skill, effort and responsibility at the grade 13 attorney level held by white males, she was paid at the grade 9 rate. J. M. MacMillan, the District counsel in Detroit and in charge of the office where Plaintiff works wrote a letter dated 8/8/80 stating that for ten months Plaintiff had been employed as an attorney performing work "consistently exceeding the GS-11 level". This letter was admitted into evidence as Plaintiff's Trial Exhibit #23 (T. R. 6-29-87, page

70). Plaintiff's Trial Exhibit #14 showed that the GS levels above GS-11 are GS-12 through 18. Title 5 U.S.C. 5104 shows likewise.

Further, Mr. MacMillan admitted at trial that during this time Plaintiff was being paid at the GS-9 rate (T. Tr. 6/29/87, page 72). Theodore Fernholz, his assistant, corroborated these facts and testified that Plaintiff did a good job performing the work above the GS-11 level, that he recommended a promotion based on the "quality and complexity" of her work, that she was being paid as a GS-9 at the time and that the senior attorneys were all white males (T. Tr. 6/29/87, page 188-189). Mr. Fernholz further testified that the duties of a law clerk and an attorney were substantially the same, except for court appearances. (T. Tr. 6/29/87, page 166). The Court erred by not reviewing the plaintiff's claim under the standard of review required by this Court

in the cases set forth in the preliminary arguments supra.

The Equal Pay Act sets forth four affirmative defenses which must be pled and proven in order to justify wage disparity between males and females. These exceptions are a bona fide: (1) seniority system, (2) merit system, (3) system based on quantity and quality of production and (4) a factor other than sex. 29 U.S.C. 206 (d) (1). Plaintiff contended during trial and on appeal that defendant did not allege a bona fide exception to justify paying her less than it paid white males Couch, Vollmar, Winslow and Wright for the same or similar work at the GS-13 level. Prior to trial, plaintiff made a motion to suppress any affirmative defenses which defendant might raise during trial. The trial judge took the motion under advisement but never made a ruling. During the trial, defendant

did not proffer a reason for paying plaintiff less than the GS-13 white males. At the conclusion of the trial the judge stated that defendant had shown "legitimate business reasons" for hiring plaintiff at a lower level than the white male, Mr. Cunningham and the white female, Ms. Faes.

The Court of Appeals affirmed the dismissal stating that "in essence, the basis of all Ms. Culberson's claims is the fact that attorneys Faes and Cunningham were employed at a grade and salary level higher than she was by the Detroit Office." The court suggested that plaintiff was willing to work for less as evidenced by the fact that she had stated on her application that the minimum starting salary she would accept was $16,000.00.

Plaintiff petitioned for rehearing in banc of the Court of Appeals decision on the basis that:

(1) On page 6 of the decision, the Court states that the basis of the Equal Pay Act claim was the fact that Ms. Faes and Mr. Cunningham were employed at a grade and salary level higher than plaintiff. This statement was in error. Review of the trial testimony of plaintiff at pages 41, 46-50, 59-60, 64,67 and 69, the Final Pretrial Statement, page 15 of Appellant's Responsive Brief, Testimony of John MacMillan 6/29/87 transcript page 72 and the testimony of Theodore Fernholz 6/29/87 transcript pages 188-189, clearly reveal that the basis of the plaintiff's

Equal Pay Act claim was the fact that she was paid less than white males Couch, Vollmar, Wright and Winslow for performing the same work with the same degree of skill effort and responsibility. Defendant admitted that plaintiff was paid less, notwithstanding the fact that she was assigned and performed the work at the higher grade level satisfactorily. Defendant did not proffer an explanation for the pay differential. Plaintiff specifically testified that her work was different from and of greater quality than that performed by Cunningham. Defendant did not dispute this fact.

Reasons For Granting Writ

The United States Supreme Court in *Continental Ore Co. v Union Carbide Carbon Co., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410 (1962)* stated that "Appellants should be given the full benefit of their proofs without tightly compartmentalizing the various factual components..." Appellant respectfully represented that she was not given the benefit of any of her undisputed proofs in her claim for violation of the Equal Pay Act.

Plaintiff testified that the work was performed at the GS-13 level held by white males (T. R. 6/30/87, page 41, 46-50, 59-60, 64 and 67). Mr. Cunningham was a GS-12.

Neither Court considered the statutes governing the terms and conditions of federal employment which the Veterans Administration was obligated to follow in hiring, promotion, and in establishing the rate of pay commensurate with the work actually performed by an employee. Neither Court considered case law governing claims of violation of Title VII of the Civil Rights Act and the Equal Pay Act.

Actual job performance is the critical factor for determining the rate of pay of a federal employee. 5 U.S.C. 2301 (b) (3) and 5 U.S.C. 5101. The degree of skill, effort and responsibility required to perform at a particular grade level is defined by statute and is divided into 18 grade levels of difficulty and responsibility. 5 U.S.C. 5104.

Federal employment policy provides that the purpose of the grades is to provide a plan of classification whereby:

> (1) In determining the rate of basic pay which an employee will receive --
>
> (A) the principle of equal pay for substantially equal work will be followed; and
>
> (B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service." 5 U.S.C. 5101.

Hence the work assigned to an employee should be commensurate with the grade level to which the employee is assigned; the rate of pay should be commensurate with the work assigned.

Burroughs v Office of Personnel Management, 764 F 2d 1300 (CA9, 1985). The moment the District Counsel's Office began requiring Plaintiff to perform work above the GS-9 level, it should have begun paying her at the highest level commensurate with the work being performed. There was no evidence that other law clerks in the country for the VA were required to work at the GS-13 level for a GS-9 rate. Nor was there such evidence pertaining to the white males hired at GS-9 or Mr. Cunningham.

There is no provision in the U.S. Code governing federal employment which requires a specified amount of time in a particular grade before promotion to another grade. The only time in grade requirement remaining after repeal of the Whitten Amendment is for periodic step increases within a grade. 5 U.S.C. 5334. This statute does not apply

to an increase in pay granted by statute. Subsection (d).

The national policy further provides that promotion of a federal employee should be determined solely on the basis of relative ability, knowledge and skills. 5 U.S.C 2301 (b) (1). Equal pay should be provided for work of equal value and appropriate incentives and recognition should be provided for excellence in performance. 5 U.S.C. 2301 (b) (3).

The Court of Appeals' decision is also in conflict with well established precedent of this Court: *Gunther v Washington Co.*, 101 S Ct. 2242, 452 U.S. 161, 68 L. Ed. 2d 751 (1981) (actual job performance and content, not title, classifications or descriptions is determinative); *Corning Glass Works v Brennan*, 417 U.S. 188, 190 (1974), where the court

stated that a pay differential based on a woman's willingness to work for less money is in itself unlawful. Even if plaintiff was willing to work for less than the males, that was not a valid basis for discrimination in compensation. See also, *Di Salvo v Chambers of Commerce*, 416 F. Supp 844, affirmed in part modified in part on other grounds, 568 F 2d 593 (CA 8 1981). In *Lafferty v Northwestern Airlines, Inc.*, 185 App. D. 322, 567 F 2d 429 (1976) cert denied 434 U.S. 1086, 98 S Ct. 1281, 55 L. Ed. 2d 792, this court stated that the historical willingness of women to accept inferior financial rewards for equivalent work was precisely the outmoded practice which the Equal Pay Act sought to eradicate and which was, by implication, also prohibited by Title VII. See also, *Fitzgerald v Sirloin Stockades, Inc.*, 624 F 2d 945 (CA 10 1988) (Female who actually performed her job at a higher level for less pay than males proved a violation of Title VII. The Equal Pay

Act was not controlling simply because the standards were not met).

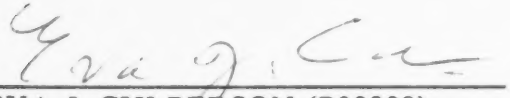
Plaintiff's actual job content was that of a GS-13 attorney. Yet she was paid at a lower level. Defendant did not proffer an explanation for paying plaintiff less for performing work at the GS-13 level held by white male attorneys. This Court has held that failure to distinguish between pay differentials is fatal to an employer's defense. *Los Angeles Department of Water and Power v Manhart*, 435 U.S. 702 (1978). The Court of Appeals erred in not applying the decisions of this Court in reviewing plaintiff's Equal Pay Act claim. The Court of Appeals erred in not correctly applying the federal personnel statutes governing pay for actual job performance. Finally, the Court of Appeals erred in concluding that the Equal Pay Act claim and the Title VII claim were the same when in fact they

arose out of different factual circumstances requiring different standards of review.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this petition for Writ of Certiorari be granted.

Respectfully represented,



EVA J. CULBERSON (P30902)

88-963 (2)

FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In the

Supreme Court of the United States

October Term, 1988

Eva J. Culberson
Petitioner

V.

Veterans Administration
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EVA J. CULBERSON

Plaintiff-Appellant,

v. (Filed June 27, 1988)

VETERANS ADMINISTRATION,

Defendant-Appellee.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
(No. 87-1708)**

BEFORE: MILBURN, GUY and NORRIS, Circuit Judges.

PER CURIAM: Plaintiff-appellant Eva Culberson appeals a judgement for the defendant in this action brought pursuant to the Equal Pay Act, *28 U.S.C. Sec. 206 (d)*, and *Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e* et seq.

Ms. Culberson graduated from the University of Detroit College of Law in May of 1979. On September 20, 1979, while awaiting the results of the bar examination, she filed an application for employment with the local District Counsel's Office of the Veterans Administration ("VA") in Detroit, Michigan. She applied for the position of attorney. On her application, Ms. Culberson indicated that she would start as of October 1, 1979, and that she would accept a minimum salary of $16,000.

The head of the VA District Counsel's Office in Detroit was John McMillan, who held the title of District counsel. At that time, however, he was on leave of absence and Assistant District Counsel Ted Fernholz was in charge. Fernholz interviewed Ms. Culberson two or three times for the position, was impressed, and recommended to the General Counsel Office in Washington that she be hired.

In order to qualify for the position of general attorney, the VA's personnel regulations require that one must have passed the bar examination. McMillan testified at trial that it is unusual for the VA to even interview persons for attorney positions who have yet to pass the bar examination, and that all previous hirings at the Detroit office had been restricted to persons who had already passed the bar.

It is uncontroverted that a local District Counsel of the VA does not have the authority to hire employees or establish the terms of employment for its employees. The General Counsel in Washington, D.C., is in control of these determinations. The local office is only empowered to interview potential candidates and to send a list of potential candidates to the General Counsel's Office with a recommendation as to which candidate or candidates should be hired.

In response to a perceived "bracket creep," all local District Counsel Offices at the time of Ms. Culberson's hiring were restricted to hiring attorneys at the GS-9 grade level. The GS-9 grade level was the original entry level for attorneys in the VA. Over time, however, bracket creep had resulted in the average grade level of entering attorney's being at the GS-11 grade level. However, in late 1977 or 1978, the VA was instructed to reduce the entry grade level to GS-9. Therefore, at the time of Ms. Culberson's hiring, virtually all entry level attorneys were hired at the GS-9 grade level. The few exceptions occurred when a District Counsel's office could not find any applicants willing to work at that grade. Ms. Culberson's salary demand of $16,000.00 was less than the existing GS-9 grade level rate of $17,335.00. As a result, her name was included in the list of candidates willing to accept a GS-9 grade level.

Pursuant to the local District Counsel's recommendation, the General Counsel hired Ms. Culberson on October 21, 1979. As she had not yet received her bar examination results, she was hired as a law clerk. While the Detroit office had never previously employed anyone as a law clerk, the position had been used elsewhere in the VA for law school graduates who had not yet passed the bar. It is uncontroverted that the understanding between the VA and Ms. Culberson was that if she passed the bar examination, her law clerk's position would be converted into a general attorney position. At trial, Ms. Culberson contended that Fernholz also informed her that her grade level would be converted from GS-9 to GS-11 upon her passing the bar. This was denied by Fernholz, who insisted he informed Ms. Culberson that her grade level would stay the same if her position were converted to that of an attorney.

Two weeks after she was hired, Ms. Culberson received word that she had passed the bar examination. The VA then converted her position to that of attorney, but declined her demand that she be given a grade and pay increase to the GS-11 level. Under the VA's personnel regulations, when an employee is hired at the GS-9 grade level, the employee must wait at least a year before being eligible for promotion to GS-11. The local District Council Office informed Ms. Culberson that they could not consider giving her a promotion to the GS-11 grade level until she met the one-year time-in-grade requirement.

Ms. Culberson then filed a discrimination complaint. In an effort to resolve the dispute, McMillan sent a letter to the General Counsel's Office on August 8, 1980, seeking an exception to the time-in-grade rule to allow Ms. Culberson to be

promoted to the GS-11 grade level prior to one year in service. McMillan stated that she was performing at or above the GS-11 grade level. However, the General Counsel's Office declined to make an exception. While several exceptions had been requested in the past, the General Counsel's Office has never granted one. After Ms. Culberson served one year at grade GS-9, she was promoted to grade level GS-11. At the present time, Ms. Culberson is still employed by the Detroit office of the VA and is currently a GS-13, having received all the grade promotions available to her.

At the time of Ms. Culberson's hiring, Richard Cunningham also began working at the office as a general attorney. Cunningham, a ten-year employee of the VA, had become an attorney six months prior to his reassignment. He had previous experience as the Chief of Filed Services in another area of the

VA and was allowed to keep his GS-12 grade on reassignment.

In 1977, the Detroit office hired Ms. Maureen Faes, a white female, as a general attorney. At the time of her employment, Ms. Faes had been a member of the bar for two years and had previous experience as a schoolteacher. She was hired at the grade level of GS-11, which was the approved entry level at that time.

Shortly after Ms. Culberson's employment, in January and March of 1980, two white male attorneys were hired to work in the Detroit office. They were, like Ms. Culberson, recent bar admittees and were hired, like Ms. Culberson, at the GS-9 grade level and promoted to the GS-11 grade level in one year.

After exhausting administrative remedies, Ms. Culberson filed an action in the district court on April 12, 1983, claiming race and sex discrimination under Title VII and a violation of the Equal Pay Act. In essence, the basis of all of Ms. Culberson's claims is the fact that attorneys Faes and Cunningham were employed at a grade and salary level higher than she was by the Detroit office. After a two-day bench trial, the district court found against Ms. Culberson on all counts and entered a judgement in favor of the defendant on January 2, 1987.

The district court found that Ms. Culberson had failed to establish a prima facie claim under either the Equal Pay Act or Title VII. Even if she had established a prima facie claim, the court held that legitimate business reasons justified any pay differential. We agree.

Therefore, upon consideration of the entire record, the briefs filed herein, and after oral argument, we AFFIRM the judgment of the district court for the reasons set forth in its Findings of Fact and Conclusions of Law on July 2, 1987.

No. 87-1708
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVA J. CULBERSON,
Plaintiff-Appellant
v.
VETERANS ADMINISTRATION,
Defendant-Appellee

(Filed August 15, 1988)

BEFORE: MILBURN, GUY and NORRIS, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

DISTRICT COURT CONCLUSIONS

Detroit, Michigan
Thursday, July 2, 1987

- - - - -

(At 9:00 a.m. proceedings were commenced.)

THE CLERK OF THE COURT: Case Number 83-3331 Culberson versus the United States.

MR. TAYLOR: Ready.

THE COURT: Anything further, Mr. Taylor.

MR. TAYLOR: No, sir, Your Honor.

THE COURT: Mr. Overman?

MR. OVERMAN: Nothing, Your Honor.

THE COURT: Let me -- let the Court return to you the exhibits which I have completely examined.

The plaintiff, Eva Culberson, commenced this action in August of 1983. Proceeded in this

being race discrimination, second being sex discrimination, and finally she alleges violations of the Equal Pay Act.

The matter was tried over a two day period, and the Court having reviewed the testimony and the exhibits submitted by the parties on both sides, the Court makes the following findings of fact and conclusions of law.

The jurisdiction of the Court is based upon violations of Title VII, mainly sex and race discrimination and violations of the Equal Pay Act. The Court finds that the plaintiff is a black female who in September of 1979 applied for the position of -- as an attorney with the local office of the Veteran's Administration, the defendant here. Although the plaintiff was a law school graduate, she had not yet passed the bar, Michigan bar examina-

tion. And, therefore, was not an attorney admitted to practice law.

The defendant, however, offered to hire the plaintiff as a law clerk at the pay grade of GS 9, with the understanding that her position would be converted to attorney if and when she passed the bar examination. The plaintiff accepted the GS 9 law clerk position in October -- on October 21 of 1979. The plaintiff was notified in early November of 1979, not quite a month later, probably two weeks later that she passed the bar examination. Upon that notice, the plaintiff notified the defendant in November of 1979 that she had in fact passed the bar exam.

On December 30, 1979, the defendant local office did convert plaintiff's position from a law clerk GS 9 to attorney GS 9. When plaintiff

inquired subsequently about her pay, she was told that she could not be promoted to a GS 11 until she completed the time and grade requirement and served one year as a GS 9, GS 9 attorney. He pay was not raised to a GS 11 until November of 1980, which is just one year later.

Plaintiff's complaint in this case alleges race discrimination first, and second sex discrimination. And as I indicated the third being violations of the pay act. Plaintiff essentially contended during the course of the trial that she was discriminated against on the basis of her race and sex by the failure of the defendant district counsel, the district counsel's failure to raise her pay to GS 11. And in fact, not hiring her as a GS 11 in the first instance, and by especially failing to promote her to GS 11 after she passed the bar examination.

She now asserts that during the interview process, defendant district office promised her that she would be promoted to a GS 11 level after she passed the bar exam. She further contends that she performed work of equal skill effort and responsibility to work performed by certain mail employees of the department, but was nevertheless paid less for the work because she is a woman.

Since the claims were presented separately, I will try to discuss them separately in my findings of fact. Starting first with plaintiff's claim of race discrimination. Plaintiff, during the course of the trial based her claim of race discrimination on disparate treatment. She claims that she was hired as a GS 9 rather than a GS 11 because she was black. She failed however to present any evidence that she was treated differently on the basis of her race. The plaintiff was hired as a law clerk at the

GS 9 level. She could not have been under any circumstances hired as an attorney because she was not admitted to the state bar. She was the first law clerk ever hired by the Detroit office. From January 1979 -- 1978 through December of 1980, however, eight law clerks were hired by the general counsel of the Veteran's Administration to serve in various field offices. Three of those clerks including the plaintiff were black females. Two were white males, and three were white females. All were hired at a Gs 9 level.

It's clear to the Court that plaintiff was treated the same as all other persons hired as law clerks. In addition of the six candidates, the defendant submitted to the office of general counsel of the Veteran's Administration in Washington for consideration for the new position that the Detroit office, the defendant elected to recommend plaintiff

for that position. The Court also notes that the minimum salary that the plaintiff listed on her application was below the GS 9 level. She voluntarily indicated that she would consider employment at $16,000, and the GS 9 level at the time was $17,500.

Plaintiff's second race discrimination claim is based upon defendant's failure to promote or to convert her position to GS 11 immediately after she passed the bar examination, and was and had become a lawyer. Plaintiff bases this claim primarily on the fact that at the same time the defendant hired her, defendant transferred a white male to an entry level of attorney position at G -- at the GS 12 level. Defendant also had hired entry level attorneys at GS 11 level in prior years. Plaintiff further relies on Mr. Fernholz alleged promise that she would be converted to GS 11 after she became an attorney admitted to practice law. Fernholz who interviewed

the plaintiff and recommended her for the position, of course, denied in his testimony making such a promise to plaintiff. The testimony at trial however clearly established that the local field offices and their officers employed here do not set pay rates for the Veteran's Administration. Neither the district counsel or the deputy district counsel or anyone in the local office has any authority to set pay rates for the Veteran's Administration. All new hires and transfers and their pay rates must be authorized by the office of the general counsel located in Washington, D.C..

In this case, the evidence shows that the defendant was recruiting for an entry level attorney. The recruitment notices did not mention the salary offer. Mr. Fernholz testified that In October of 1979, he was authorized to hire at the GS 9 level. Mr. Coy, a personnel officer for the general counsel

confirmed that fact. Mr. Fernholz submitted a list of six names to the general counsel, all of whom he believed had agreed to work at the GS 9 level. He indicated in the letter that other qualified individuals had applied for the position, but these other individuals would not be willing to work or be hired in at a GS 9 level. Even if Mr. Fernholz did promise plaintiff a GS 11 position after she passed the bar, he did so obviously from the regulations without any authorization. While plaintiff may have some kind of claim for breach of that promise, if the promise was made, the mere fact of the breach itself or the mere fact that he did not fulfill that promise certainly is not evidence of discrimination, unless the plaintiff was treated differently than other similarly situated employees.

The plaintiff in this case sought promotion or conversion to GS 11 only one month after she

was hired in as a GS 9. The defendant eventually denied the change because a VA employee must serve one year in a GS 9 grade before being promoted to a GS 11. That is clearly the time and grade requirement that is not only applicable to VA personnel attorneys as well as other personnel, it's typical throughout Government service.

The Court finds that the defendant did have such a rule, and that the general counsel had never granted an exception to that rule. According to the testimony the defendant did attempt to have the rule waived in plaintiff's case, but the defendant was unsuccessful. It is also clear from the evidence that plaintiff was not the only entry level attorney hired at the GS 9 pay grade. In January and March of 1980, the defendant hired two while male attorneys at GS 9, for the Detroit office. These attorneys like the plaintiff were promoted to GS 11 in

January and March of 1981, one year after they had served at the GS 9 level. In addition, the records compiled by the assistant general counsel demonstrate that between 1978, and 1980, 28 attorneys were hired at the GS 9 level, and were not promoted to GS 11 until they had served at least one year in the GS 9 grade level, being exactly comparable to what plaintiff had to do.

Plaintiff in this case tries to prove disparate treatment by comparing herself with two attorneys hired in the Detroit office, namely, defendant -- namely, Maureen Faes, whom defendant hired in 1977 at an entry level of GS 11. Faes, however, the court finds had been a member of the bar for two years, and had previous experience as a school teacher. And it's very clear from the evidence that the defendant believed at the time that that was valuable experience and valuable background

that they could use in instructing other personnel at the district office, and obtained her for that purpose.

In addition, in 1977, the general counsel approved GS 11 for an entry position. In 1979, however, when the plaintiff was hired, the general counsel had adjusted the entry level position even reducing it to GS 9 as part of an effort to reduce what they described, that the general counsel described as classification creep. The Court finds that the plaintiff simply was not similarly situated to Maureen Faes. The plaintiff also compares herself with a one Richard Cunningham who was transferred to the district counsel office at the same time the plaintiff was hired. Cunningham was an attorney at the time he was transferred, and had previous experience as the chief of the field services in a competitive service of the Veteran's Administration.

He had been a GS 12 at his prior position, and the general counsel authorized the defendant district counsel to continue Mr. Cunningham at that grade as an attorney.

It's apparent to the Court that throughout Government service, if someone is employed by the Government in a certain pay level, and they are transferred within the same executive branch of some other office, they do not and cannot reduce their pay. They might reduce the grade level and increase them at a step comparable to the position, comparable to the salary they had prior to changing positions. But even if the defendant lowered Cunningham's grade, as I say, they still would have had to pay him an amount equivalent to GS 12 because he transferred from another part of the agency.

Thus, the Court finds that the plaintiff is not similarly situated to Cunningham. The defendant in this case hired plaintiff at the GS 9 level, and promoted her one year later and the Court finds that they did that pursuant to its regulations. The evidence further shows that the defendant hired two other entry level attorneys at GS 9, a few months after it hired the plaintiff. And promoted these two other hirees to a GS 11 one year after they served in the GS 9 grade level. The other new attorney brought in in 1979 was transferred from another office, and was not newly hired. He retained the GS 12 pay level that he had achieved as a supervisor in a competitive service. In other words, the Court finds that plaintiff has failed to present any evidence that she was treated differently because she is black in either terms of hiring or promotion. Accordingly, her race discrimination claim is dismissed.

Next, plaintiff has alleged here sex discrimination, contending that she was treated differently because she is a woman. And she relies primarily on the same evidence set forth on her race discrimination count. Plaintiff in this case has also relied on the statement by Mr. Fernholz that he could understand her insisting on the raise prior to the expiration of the year if she was married and had kids. In the Court's view, I simply don't believe that this is any evidence of sex discrimination taken in the context that statement was made, if it was made. We find that Mr. Fernholz made that during a debate or an argument from plaintiff that she should be raised immediately to GS 11. The evidence, the documentary evidence shows that there was actually a small amount differentiating GS 9, I think $17,500 and the GS 11 at the time being something like $20,456. In that context, taking that small difference naturally, you might say, I can understand

your financial pinch if you were married and had children, but I can't understand it because you are single. I simply fail to see any sex discrimination evidence in that kind of a statement. Fernholz explained to plaintiff that he simply could not obtain authorization to raise her to GS 11 before she served a year in GS 9. And it's very clear from this evidence, that Mr. Fernholz apparently wanted plaintiff to stay on as an attorney at the V.A. despite the pay differential. And he believes and he clearly believed that slight difference, and it should not make a real big difference to a person that was unmarried. Well the comment may have been inappropriate or may have been in poor taste or whether he should have known it could have been taken as the plaintiff took it in another context, is certainly not evidence of discrimination. Particularly when he was the person who recommended plaintiff for the job, and he was the person that requested

from the general counsel that an exception to the time and grade rule be made in plaintiff's case.

It's clear from the record that plaintiff was paid the same as two other new hires, GS 9. It's clear from the record that she was promoted to GS 11 as soon as she became eligible under the time and grade requirement just like everyone else. And there's simply no evidence of disparate treatment of plaintiff because of sex discrimination, and that claim is also dismissed.

Finally, plaintiff contends that she performed the same work as a male employee, namely Mr. Cunningham, and was paid less than he was for it. It appears from the evidence introduced at trial, that plaintiff and Mr. Cunningham did in fact perform similar work under similar working conditions.

The plaintiff was involved in law enforcement activities, administrative tort claims, loan guarantee work, probate matters, landlord tenant work, collections, acquisitions and opinion writing, work in the Court's view, which is not complicated, it's fairly simple work, requires no extra skill, and any attorney who has freshly passed the bar ought to be able to do that work.

Plaintiff testified that other attorneys in the office with few exceptions also handled these various areas of work, but they she claims were paid more. The evidence demonstrates that all attorneys at the district counsel office performed this type of work. But it's very clear that the work is assigned to attorneys or can be assigned to any attorney as it comes in through the authority of the district counsel. He testified that if any case in any of those areas came in and happened to have com-

plicated factors to it, or happened to have circumstances involving numerous phases to it, too complicated, he then would of course, assign that to a more experienced and to a more senior lawyer. But even if all the attorneys performed the same work, however, the Court finds that plaintiff failed to establish a violation of Equal Pay Act.

Plaintiff compares herself to Mr. Cunningham who was hired at GS 12, while ignoring at the same time Mr. Golski and Mr. LaFave who also did similar work and were hired at a GS 9.

The Court finds that the plaintiff cannot choose one male out of many males working there and compare herself to that particular one male. Even if the comparison were appropriate, the defendant in this case established a legitimate exception under the Equal Pay Act, namely that Mr.

Cunningham was transferred within the agency and simply maintained his level of pay within the GS system as required by the regulations.

The Court finds a total lack of evidence in the record establishing a violation of Equal Pay Act, and that complaint is dismissed. And, therefore, the entire complaint is dismissed and Judgment will be entered for the defendant. You may present that judgment.

MR. OVERMAN: Thank you, Your Honor.

THE COURT: Court adjourned.

(At 9:40 a.m. proceedings were adjourned)

APPLICABLE STATUTES

42 U.S.C. Sec. 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would depirve or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment. . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statues or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

28 U.S.C. 206 (d) (1)
Prohibition of sex discrimination

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or

any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title 5 U.S. Code

Sec. 5101. Purpose

It is the purpose of this chapter to provide a plan for classification of positions whereby --

(1) in determining the rate of basis pay which an employee will receive --

(A) the principle of equal pay for substantially equal work will be followed; and

(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service; and

(2) individual positions will, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined by section 5102 of this title, and the various classes will be so described in published standards, as provided by section 5105 of this title, that the resulting position-classification system can be used

in all phases of personnel administration. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 443*

Sec. 5102. Definitions; application

(a) For the purpose of this chapter [5 USCS Sec. 5101 et seq.] --

(1) "agency" means --
(A) an Executive agency;

(2) "employee" means an individual employed in or under an agency;

(3) "position" means the work, consisting of the duties and responsibilities, assignable to an employee;

(4) "class" or "class of position" includes all positions which are sufficiently similar, as to --
(A) kind or subject-matter of work;
(B) level of difficulty and responsibility; and
(C) the qualification requirements of the work; to warrant similar treatment in personnel and pay administration; and

(5) "grade" includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to --

(A) level of difficulty and responsibility; and
(B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay in the General Schedule.

(b) Except as provided by subsections (c) and (d) of this section, this chapter [5 USCS Sec. 5101 et. seq.] applies to all civilian positions and employees in or under an agency, . . .

Sec. 5104. Basis for grading positions

The General Schedule, the symbol for which is "GS," is the basic pay schedule for positions to which this chapter [5 USCS Sec. 5101 et seq.] applies. The General Schedule is divided into 18 grades of difficulty and responsibility of work, as follows:

. . .

(9) Grade GS-9 includes those classes of positions the duties of which are:

(A) to perform, under general supervision, very difficult and responsible work along special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) somewhat extended specialized training and considerable specialized, supervisory, or administrative experience which has demonstrated capacity for sound independent work;

(ii) thorough and fundamental knowledge of a special and complex subject matter, or of the profession, art, or science involved; and

(iii) considerable latitude for the

exercise of independent judgement;

(B) with considerable latitude for the exercise of independent judgement, to perform moderately difficult and responsible work, requiring --

(i) professional, scientific, or technical training equivalent to that represented by graduation from a college or university of recognized standing; and

(ii) considerable additional professional, scientific, or technical training or experience which has demonstrated capacity for sound independent work; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

. . .

(11) Grade GS-11 includes those classes of positions the duties of which are --

(A) to perform, under general administrative supervision and with wide latitude for the exercise of independent judgment, work of marked difficulty and responsibility along special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) extended specialized, supervisory, or administrative training and experience which has demonstrated important attainments and market capacity for sound independent action or decision; and

(ii) intimate grasp of a specialized and complex subject matter, or of the profession, art, or science involved, or of administrative work of marked difficulty;

(B) with wide latitude for the exercise of independent judgment, to perform responsible work of considerable difficulty requiring somewhat extended professional, scientific, or technical training and experience which has demonstrated important attainments and marked capacity for independent work; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

(12) Grade GS-12 includes those classes of positions the duties of which are --

(A) to perform, under general administrative supervision, with wide latitude for the exercise of independent judgment, work of a very high order of difficulty and responsibility along

special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring --

(i) extended specialized, supervisory , or administrative training and experience which has demonstrated leadership and attainments of a high order in specialized or administrative work; and

(ii) intimate grasp of a specialized and complex subject matter or of the profession, art, or science involved;

(B) under general administrative supervision, and with wide latitude for the exercise of independent judgment, to perform professional, scientific, or technical work of marked difficulty and responsibility requiring extended professional, scientific, or technical training and experience which has demonstrated leadership and attainments of a high order in professional, scientific, or technical research, practice, or administration; or

(C) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

(13) Grade GS-13 includes those classes of positions the duties of which are --

(A) to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of unusual difficulty and responsibility along special technical, supervisory, or administrative lines, requiring extended specialized, supervisory, or administrative training and experience which has demonstrated leadership and marked attainments;

(B) to serve as assistant head of a major organization involving work of comparable level within a bureau;

(C) to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of unusual difficulty and responsibility requiring extended professional, scientific, or technical research, practice, or administration; or

(D) to perform other work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

Sec. 5107. Classification of positions

Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Office of Personnel Management or, if no published standards apply directly, consistently with published standards. When

facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. Subject to subchapter VI of chapter 53 of this title, these actions of an agency are the basis for pay and personnel transactions until changed by certificate of the Office. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 453; Pub.L. 95-454, Title VIII, Sec. 801(a)(3)(E), Title IX, Sec. 906(a)(2),(3), Oct. 13, 1978, 92 Stat. 1222, 1224.*

Sec. 5332. The General Schedule

(a) The General Schedule, the symbol for which is "GS", is the basic pay schedule for positions to which this subchapter applies. Each employee to whom this subchapter applies, except an employee covered by the merit pay system established under section 5402 of this title, is entitled to basic pay in accordance with the General Schedule.

Sec. 5333. Minimum rate for new appointments; higher rates for supervisors of prevailing rate employees

(a) New appointments shall be made at the minimum rate of the appropriate grade. However, under regulations prescribed by the Office Of Personnel Management which provide for such considerations as the existing pay or unusually high or unique qualifications of the candidate, or a special need of the Government for his services, the head of an agency may appoint, with the approval of the Office in each specific case, an individual to a position in GS-11 or above at such a rate above the minimum rate of

the appropriate grade as the Office may authorize for this purpose. The approval of the Office in each specific case is not required with respect to an appointment made by the Librarian of Congress. *Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 467; Pub.L. Sec. 1(19), Sept. 11, 1967, 81 Stat. 199; Pub.L. 95-454, Title IX, Sec. 906(a)(2), (3), Oct. 13, 1978, 92 Stat. 1224;; Pub.L. 96-54, Sec. 2(a)(26)(A), Aug. 14, 1979, 93 Stat. 382.*

Sec. 5334. Rate on change of position or type of appointment; regulations

(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management in conformity with this subchapter and chapter 51 of this title when --

(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;*

(2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;

(3) he is demoted to a position in a lower grade;

(4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;

(5) his type of appointment is changed;

(6) his employment status is otherwise changed; or

(7) his position is changed from one grade to another.

(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to --

(1) the maximum rate of the higher grade; or

(2) his existing rate of basic pay, if that rate is the higher. If an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter on reduction in grade, he is entitled to --

(A) basic pay at a rate two steps above the rate which he would be receiving if subchapter VI of this chapter were not applicable to him; or

(B) his existing rate of basic pay, if that rate is the higher.

Sec. 5361. Definitions

For the purpose of this subchapter --

(1) "employee" means an employee to whom chapter 51 of this title applies, and a prevailing rate employee, as defined by section 5341(a)(2) of this title, whose employment is other than on a temporary or term basis;

(2) "agency" has the meaning given it by section 5102 of this title;

(3) "retained grade" means the grade used for determining benefits to which an employee to whom section 5362 of this title applies is entitled;

(4) "rate of basic pay" means, in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343 of this title;

(5) "covered pay schedule" means the General Schedule, any prevailing rate schedule established under subchapter IV of this chapter, or the merit pay system under chapter 54 of this title;

(6) "position subject to this subchapter" means any position under a covered pay schedule; and

(7) "reduction-in-force procedures" means procedures applied in carrying out any reduction in force due to a reorganization, due to lack of funds or curtailment of

work, or due to any other factor. ***Added Pub.L. 95-454, Title VIII, Sec 801(a)(1), Oct. 13, 1978, 92 Stat. 1218.***

Sec. 5362. **Grade retention following a change of positions or reclassification**

(a) Any employee --

(1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and

(2) who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position, is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

(b) (1) Any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such position before reduction be treated as the retained grade of such employee for the 2-year period beginning on the date of the reduction in grade.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to any reduction in the grade of a position which had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

(c) For the 2-year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the employee's position for all purposes (including pay and pay administration under this chapter and chapters 54 and 55 of this title, retirement and life insurance under chapters 83 and 87 of this title, and eligibility for training and promotion under this title) except --

(1) for purposes of subsection (a) of this section,

(2) for purposes of applying any reduction-in-force procedures,

(3) for purposes of determining whether the employee is covered by the merit pay system established under section 5402 of this title, or

(4) elects in writing to have the benefits of this section terminate. ***Added Pub.L. 95-454, Title VIII, Sec. 801(a)(1), Oct. 13, 1978, 92 Stat. 1219.***

Sec. 5363. **Pay retention**

(a) Any employee --

(1) who ceases to be entitled to the benefits of section 5362 of this title by reason of the expiration of the 2-year period of coverage provided under such section;

(2) who is in a position subject to this subchapter and who is subject to a reduction or termination of a special rate of pay established under section 533 of this title; or

(3) who is in a position subject to this subchapter and who (but for this section) would be subject to a reduction in pay under circumstances prescribed by the Office of Personnel Management by regulation to warrant the application of this section;

is entitled to basic pay at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

(b) For the purpose of subsection (a) of this section, "allowable former rate of basic pay" means the lower of --

(1) the rate of basic pay payable to the employee immediately before the reduction in pay; or

(2) 150 percent of the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay.

(c) The preceding provisions of this section shall cease to apply to an employee who --

(1) has a break in service of one workday or more;

(2) is entitled by operation of this subchapter or chapter 51, 53, or 54 of this title to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

(3) is demoted for personal cause or at the employee's request. ***Added Pub.L. 95-454, Title VIII, Sec. 801(a)(1), Oct. 13, 1978, 92 Stat. 1219.***

Title 5 Code of Federal Regulations

Sec. 536.208 Demotion for personal cause or at an employee's request.

(a) Under 5 U.S.C. 5362(d)(2) and 5 U.S.C. 5363(c)(3), grade and pay retention, respectively, cease to apply to an employee who is reduced in grade for personal cause or at his or her own request.

(b) A demotion for personal cause is an action based on the conduct, character, or unacceptable performance of an employee.

(c) A demotion is considered to be at an employee's request if the demotion is initiated by the employee for his or her benefit, convenience or personal advantage, or when the employee

requests or consents to a demotion in lieu of a proposed adverse action for personal cause.

Sec 536.212 Extension of pay retention to employees in other circumstances.

(a) Under 5 U.S.C. 5363(a)(3), the Office of Personnel Management is authorized to prescribe circumstances in which pay retention shall be extended to employees who are not otherwise entitled to pay retention under 5 U.S.C. 5363. The Office of Personnel Management has determined that pay retention shall be extended under this provision, except as provided in paragraph (c) of this section, to any employee whose rate of basic pay would otherwise be reduced:

(1) As a result of reduction in force or reclassification when the employee does not meet the eligibility requirements for grade retention;

(2) As a result of the employee's declination of an offer to transfer with his or her function under circumstances not qualifying the employee for grade retention, reassignment to a position in a lower wage area, or reassignment to a position in a different pay schedule;

(3) As a result of the placement of the employee in a formal employee development program generally utilized Government-wide: Upward Mobility, Apprenticeship, and Career Intern Programs; or as the result of placement in a position which the agency has determined is hard to fill;

(4) Because the employee no longer meets a specific condition or requirement established by the agency or the Office of Personnel Management, such as allowable periods of service in foreign areas or qualifications requirements (including physical standards); or

(5) As the result of the reduction or elimination of scheduled rates, except those reflecting a decrease in the level of prevailing rates as determined by a wage survey, and the reduction or elimination of special schedules or special rates, other than those authorized under 5 U.S.C., 5303 (for which pay retention is provided by law).

(b) Except as provided in paragraph (c), an agency may extend pay retention to any employee whose rate of basic pay would otherwise be reduced:

(1) Under circumstances similar to those listed in paragraph (a); or

(2) As a result of a personnel action initiated by management to further an agency's mission, in accordance with the general intent of subchapter VI of chapter 53 of title 5, United States Code.

(c) This section does not extend pay retention to any employee:

(1) Who is reduced in grade or pay as a result of the termination of a temporary promotion; or

(2) Who is reduced in grade or pay for personal cause or at the employee's request.

(d) An employee to whom pay retention is extended by this section shall receive retained pay in accordance with the provisions of 5 U.S.C,. 5363 and the applicable sections of this part.

Sec. 536.213 Grade and pay retention in other circumstances

Under 5 U.S.C. 5365(b)(2)-(3), the Office of Personnel Management may provide for the application of all or portions of grade and pay retention benefits in circumstances not covered under 5 U.S.C. 5362-5363. the Director, Office of Personnel Management, or his or her designee, is authorized to approve, at the request of an agency, the application of grade and pay retention benefits, or any appropriate portion thereof, in such situations as that official determines appropriate and necessary.

Sec. 2301. Merit system principles

(a) This section shall apply to --

(1) An Executive agency;

. . .

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and

advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

Sec. 2302. **Prohibited personnel practices**

(a) (1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section --

(A) "personnel action" means --

(i) an appointment;
(ii) a promotion;

(viii) a performance evaluation

under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade level; with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(1) discriminate for or against any employee or applicant for employment --

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

. . .

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of --

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

. . .

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

. . .

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or

injuring the prospects of any particular person for employment;

. . .

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with an enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under --

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 20003-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

. . .

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d), prohibiting discrimination on the basis of sex;

. . .

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation. ***(Added Pub.L. 95-454, Title I, Sec. 101(a), Oct. 13, 1978, 92 Stat. 1114.)***

PLAINTIFF'S EXHIBIT 2

Veterans Administration
Washington, D.C. 20420

September 1, 1968

VA QUALIFICATION STANDARD

LEGAL CLERK SERIES GS-904

Auth: Schedule A, Section 213.3102

MP-5, Part I, Chapter 17, Paragraph 4

*LAW CLERK

All provisions of the VA QUALIFICATION STANDARD FOR GENERAL ATTORNEY, GS-905-9/12, Parts I and II, dated September 1, 1968 are applicable except the BAR MEMBERSHIP REQUIREMENTS.

*Appointment to the position of Law Clerk is made under the provisions of Schedule A, FPM Ch. 213, App. C, (Sec. 213.3102(2)).

VA QUALIFICATION STANDARD
PART I

Date: September 1, 1968
Auth: USCSC Rule VI, (FPM Supplement 990-1, Book III-6). FPM Ch. 302, Subchapter 2-9 and FPM LTRE 302-4, 8-22-68

GENERAL ATTORNEY GS-905-9/15
(Law Clerk--See GS-904-Legal Clerk)

BAR MEMBERSHIP REQUIREMENTS;

Be a member in good standing of the bar of a State or Territory of the United States or the District of Columbia. Where the duties of the position call for appearance in court, the applicant must be a member in good standing of the bar, or be eligible for admission to the bar, of the State or Territory of the United States or the District of Columbia in which he is to serve.

CITIZENSHIP:

Be citizens of, or owe allegiance to, the United States.

EDUCATION:

Possess a Bachelor of Laws or Juris Doctor degree from a law school or be awarded such before appointment.*

*The education requirements are not applicable to those employees serving in Attorney positions in the VA as of the date of this Standard.

EXPERIENCE:

In one or any combination of the following types in the amounts indicated for each grade following:

a. Practice of law.

b. Other legal experience of a responsible nature in any or a combination of the following: As a law clerk; in legal research; in analysis of statutes; or in examination, investigation, or adjust-

ment of claims arising under law, contract, or governmental order.

c. In the military, naval, or other Federal service in the disposition of legal problems, as a reviewing officer, as a member of courts or boards, or in investigation activities.

GS-9: None required; however, acquired experience will be considered.

GS-11: (a) One year of experience as described above, or

(b) Graduation in the upper one-third of his law class or one of the six alternate options of The Superior Law Student Program:

(1) Work or achievement of significance on his law school's Official Law Review. . . or

(2) Special high-level honors for academic excellence in law school, such as election to the Order of the Coif,. . . or

(3) Winning a moot court competition or membership on the moot court team which represents the law school in competition with other law schools. . . or

(4) Full-time or continuous participation in a legal aid program as opposed to one-shot, intermittent or causal participation. . . or

(5) Significant summer law-office clerk experience. . . or

(6) Other equivalent evidence of superior achievement. Candidates applying under this option will be required to furnish certification from the registrar of ranking and other attainments in law school, or

(c) Possession of the L.L.M. degree.

GS-12: (a) Two years of progressively responsible experience as described above or

(b) Graduation in the upper 15% of his law class and possess the L.L.M. degree in a field of law directly

pertinent to the work of the position to be filled.

GS-13: Three years of progressively responsible experience as described above.

GS-14: Four years of progressively responsible experience as described above.

GS-15: No additional experience is required, but candidates must have demonstrated the professional and administrative abilities required to perform at the appropriate levels.

For grades GS-12/15 only, a maximum of one year of the above required experience may be acquired prior to admission to the bar.

For any grade, the required amount of experience will not in itself be accepted as proof of qualification. The applicant's experience and training must show that he has the ability to perform the duties of the position.

Applicants must submit with their application (SF 171), in addition to the information thereon required, a list of important suits, prosecutions, cases, or other legal or legislative matter, if any, in which they have participated, describing the nature of each and stating their connection therewith.

ORAL INTERVIEW (GS-9, GS-11 and GS-12 entrants into the legal profession)

Applicants must successfully pass an oral interview before appointment is made. The factors to be considered in this interview will be appearance, neatness, personality, ability to express one's self,

aptitude and interest in Federal legal work as a career, and the ability to answer technical questions of law.

PHYSICAL REQUIREMENTS:

Must be physically able to perform efficiently the duties of the positions. Good vision in one eye and ability to read without strain printed material the size of typewritten characters are required, glasses permitted. Ability to hear the conversational voice, with or without a hearing aid is required for most positions; however, some positions may be suitable for the deaf. In most instances, an amputation of leg or foot will not disqualify an applicant for appointment, although it may be necessary that his condition be compensated by use of satisfactory prosthesis. Applicants must possess emotional and mental stability. Any physical condition which would

cause the applicant to be a hazard to himself or to others will disqualify him for appointment.

Specific requirements which would not infract the last stated general requirement may be waived by the appropriate appointing authority. Recommendation of a physician may be obtained.

SELECTIVE CERTIFICATION:

Where the volume of work in one particular subject-matter field (such as administrative law, legislation, guardianship, loans, torts, or any of the several veterans' benefits, litigations, etc.) is such as to require that the appointee be specifically qualified in that field, selective certification may be used. Such cases will be substantiated by written justification.

This standard supersedes the VA Qualification Standard for General Attorney, GS-905-7/15, dated December 1, 1966.

VA QUALIFICATION STANDARD

Part II

EXAMINING GUIDE

The following Tentative Rating Schedule is to be used in conjunction with Rating Procedure No. III, Three Quality Level Rating Table FPM Supplement 337-76, with such modifications as are described below.

Selection of attorneys for appointment or promotion will be made on the basis of merit and fitness for the particular position. Each grade from GS-9 to GS-15 will be considered separately and rated on the basis of a full analysis of training and experience, quality of performance, and personal potentialities for successful employment.

DEFINITION OF TERMS:

Practice of law is defined as private, state, or Federal practice in any field of law.

Other legal experience of a responsible nature is defined as experience in a law office, government office, or in the legal department of a business establishment, in the armed forces, or other Federal Service, doing legal research, making analysis of statutes, writing opinions; or the writing of authoritative or advisory legal opinions involving interpretation of state or Federal laws, regulations and orders, or the drafting of such regulations or orders; or the drafting, analysis, and other legal activities with respect to bills, regulations, Executive Orders, proclamation, statutory regulations.

No. 88-963

(3)

APR 3 1989

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

EVA J. CULBERSON, PETITIONER

v.

VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE VETERANS ADMINISTRATION IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN R. BOLTON
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QUESTION PRESENTED

Whether the evidence supported the district court's finding that the Veterans Administration did not discriminate against petitioner on the basis of race or sex.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported. The opinion of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1988. A petition for rehearing was denied on August 15, 1988. The petition for a writ of certiorari was filed on November 14, 1988 (a Monday). The jurisdiction of this Court in invoked under 28 U.S.C. 1254.

STATEMENT

1. Petitioner is a black woman who graduated from law school in May of 1979. While waiting for the results of the bar examination, she applied for a job as an attorney with the Detroit District Counsel's Office of the Veterans Administration. She stated on her application that she would accept a salary of $16,000. Pet. App. 2a.

The Assistant District Counsel in Detroit interviewed petitioner. The Detroit office then recommended to the General Counsel's Office in Washington, D.C. that she be hired. The General Counsel's Office makes all decisions regarding the hiring of VA attorneys. In the past, the Detroit office had hired only attorneys who had passed the bar (Pet. App. 2a). The Detroit office, however, wanted to hire petitioner as a law clerk at General Schedule (GS) level 9; they planned to convert her job status to an attorney position once she passed the bar. In 1979, when petitioner was hired, VA District Counsel offices were restricted to hiring entry level attorneys at the GS-9 level (*id.* at 2a-5a).

The VA hired petitioner at the GS-9 level, which paid more than $17,000. Two weeks later, petitioner learned that she had passed the bar examination. The VA converted her job position from "law clerk" to "attorney", but it declined petitioner's request for a grade increase to the GS-11 level (Pet. App. 6a). According to standard VA policy, an employee hired at the GS-9 level must wait at least one year before becoming eligible for promotion to GS-11 (*ibid.*). After petitioner filed a charge of discrimination, the Detroit District Counsel requested an exception to that rule to allow petitioner to be promoted immediately to the GS-11 grade level. (*id.* at 6a-7a). The General Counsel's Office denied that request. Accordingly, petitioner worked one year at grade GS-9 before she was promoted to GS-11. She is now employed by the Detroit office at the GS-13 level (*ibid.*).

2. Petitioner filed this suit claiming race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. 206. After a two-day trial, the district court found in favor of the VA. The district court ruled that petitioner had failed to prove her claims of discrimination (Pet. App. 16a-31a). The court found that the VA had legitimate reasons for hiring petitioner at the GS-9 level (*id.* at 17a-21a).

The court of appeals affirmed on the basis of the findings and conclusions of the district court. Pet. App. 10a.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decisions of any other court of appeals. Indeed, petitioner argues only that the court of appeals erred in holding that the district court's findings were supported by the evidence. This Court's review of that fact-specific claim is not warranted.

1. Petitioner attempted to prove her claim of discrimination by comparing herself to two other VA attorneys—Maureen Faes and Richard Cunningham. The Detroit office employed Faes and Cunningham at a higher grade than petitioner (Pet. App. 7a-8a). The district court found that Ms. Faes was hired in 1977 at the GS-11 level. At that time, she had been a member of the bar for two years. She also had previous experience as a teacher, which the VA considered to be useful for instructing other personnel at the Detroit office (*id.* at 22a-23a). In 1977, moreover, the VA hired new attorneys at the GS-11 level. When petitioner was hired in 1979, by contrast, the standard entry level was GS-9 (*id.* at 23a). Thus, the district court had substantial evidence to support its finding that the VA legitimately treated petitioner and Ms. Faes differently.

Mr. Cunningham was transferred to the Detroit District Counsel's Office at the same time that petitioner was hired. Unlike petitioner, however, he was a licensed attorney when he transferred. He also had worked for the VA for ten years and had been Chief of Field Services in another office. Cunningham was a GS-12 in his prior position and the VA allowed him to continue at that grade as an attorney (Pet. App. 24a).* Accordingly, as the district found, the VA treated Cunningham differently from petitioner because of his prior government experience (*ibid.*).

There is other evidence to support the district court's findings. In January and March of 1980, shortly after petitioner began working, the Detroit office hired two white men as attorneys. As was the case with petitioner, they were hired at the GS-9 level and promoted to the GS-11 level after one year (Pet. App. 8a). In sum, the district court had a solid basis for finding that petitioner "failed to present any evidence that she was treated differently because she is black in either terms of hiring or promotion" (*id.* at 25a).

2. The district court also was justified in rejecting petitioner's claim under the Equal Pay Act—*i.e.*, that she "was paid less than white male GS-13 attorneys for performing the same work at that level" (Pet. 4). The Equal Pay Act prohibits an employer from paying wages to employees of one sex at a rate less than the rate being paid to employees of the opposite sex for equal work. See 29 U.S.C.

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* In determining the rate of pay of individuals under the GS system, a distinction is made between new appointments, such as petitioner, and reassignments, such as Mr. Cunningham. 5 C.F.R. 531.203, 531.202(j). Because Mr. Cunningham was being reassigned within the agency, he was eligible to be paid at his highest previous rate, which was GS-12. 5 C.F.R. 531.203(c).

206(d)(1); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Different wages may be paid if such difference is due to seniority or to any factor other than sex. 29 U.S.C. 206(d)(1).

Here, the four men at the GS-11 level with whom petitioner compared herself had been with the VA for several years at the time petitioner was hired (Tr. 23). Mr. Cunningham, who was a GS-12, had also been with the VA for many years. Petitioner was treated exactly the same as two inexperienced men who were hired soon after she began working. Those attorneys were hired at the GS-9 level and were required to remain in that grade for one year (Pet. App. 21a-22a, 25a). Thus, the district court correctly found that petitioner failed to prove a violation of the Equal Pay Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
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SANDRA WIEN SIMON
Attorney

APRIL 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00183